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HIGH COURT OF CHHATTISGARH; BILASPUR
CRIMINAL APPEAL NO. 729/2001

Sanjay Kerketta
Vs

State of Chhattisgarh

JUDGMENT

Post for 9 /02/2005

Sd//-
V.K.Shrivastava
Judge

A.F.R.

(31)

HIGH COURT OF CHHATTISGARH; BILASPUR
Criminal Appeal No. 729/2001

Appellant	Sanjay Kerketta S/o. Jwakim Kerketta, aged 24 years, r/o. village Jagarpur, (Kharidand) Thana and Tahsil Bagicha, Dist. Jashpur.
Vs.	
Respondent	State of Chhattisgarh, Through the District Magistrate, Jashpur (CG).

Shri Yogesh Pandey, Counsel for the appellant.
Shri M.P.S. Bhatia with Shri Sanjeev Kumar Agrawal, Panel Lawyer for the State.

J U D G M E N T

Dated 9th February, 2005

PRESENT:

HON'BLE SHRI JUSTICE VIJAY KUMAR SHRIVASTAVA

This is an appeal directed against the impugned judgment of conviction and sentence dated 09/07/2001 passed by the 2nd Additional Sessions Judge, Jashpur in S.T. No. 190/2000 by which the appellant has been held guilty under Sections 363, 366 and 376 (2) (f) of the I.P.C. and sentenced to undergo R.I. for 5 (five) years and to pay a fine of Rs.1,000/- (One thousand) in default of payment of fine to undergo additional R.I. for 3 (three) months, R.I. for 5 (five) years and to pay a fine of Rs.1000/- (One thousand), in default of payment of fine to undergo additional R.I. for 3 (three) months, R.I. for 10 (ten) years and to pay a fine of Rs.10,000/- (Ten thousand), in default of payment of fine to undergo additional R.I. for 1 (one) year, respectively.

2) The appellant is a tenant of father of the prosecutrix. On 05/07/2000, he came to the house of prosecutrix and invited her and her father for taking some sweets, so, both of them went to his house. In his house, the appellant asked Thadiyush Ekka, the father of the prosecutrix to wait till he comes back from tailor-shop. He took the prosecutrix, a girl of ten years, along with him. When neither of them returned back, a search was made to know their whereabouts, but they could not be traced out. Thereafter, father of the prosecutrix lodged a report with the Police on the same day at midnight regarding missing of his daughter. On the next day, in the morning, Police nabbed the appellant and prosecutrix, prepared recovery Panchnama, sent the prosecutrix and appellant for medical examination, recorded the statements of prosecutrix and witnesses, and after due investigation, came to the conclusion that, the appellant has committed offence punishable under Sections 363, 366 and 376 of the I.P.C., led a charge-sheet in the Court of Chief Judicial Magistrate, Jashpur, who committed the case for trial to the Court of Session. Appellant denied the guilt, and pleaded defence that, the father of the prosecutrix, with intent to get the premises vacated from him, has concocted this false case against him.

3) Learned trial Court, after appreciating the evidence on record, came to the conclusion that, the appellant kidnapped the prosecutrix, who was aged about 12 years, from the custody of her lawful guardian with intent to commit illicit intercourse and he committed rape on her. The learned trial Court has convicted and sentenced the appellant as aforesaid.

4) Heard learned counsel for both the parties and perused the records of the trial Court.

5) Kanti Ekka (PW/1) and Thadiyush Ekka (PW/5), who are mother and father of the prosecutrix (PW/4) respectively, have stated that, at the time of incident, the age of prosecutrix was near about ten years. Makariyush Tikkai (PW/7) has deposed that, he maintains school register of the students, and according to entry of that register, the date of birth of prosecutrix is 16/12/1989. Dr. Smt.Vinodini Bakhla (PW/11), after examining the x-ray report, has opined that, the age of prosecutrix was between 9 to 10 years.

6) Learned trial Court, after due appreciation of all the evidence, came to the conclusion that, on the date of incident, the age of prosecutrix was 12 years. Neither this finding has been challenged by the appellant in his arguments nor he has brought any material or evidence to contradict the same.

7) The offence of rape has been defined under Section 375 of the I.P.C. The relevant portion of the same reads as below :

> *"375. Rape – A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*
> *First – xxxxxxx*
> *Secondly – xxxxxxxxx*
> *Thirdly – xxxxxxxxx*
> *Fourthly – xxxxxxx*
> *Fifthly – xxxxxxxx*
> *Sixthly – With or without her consent, when she is under sixteen yeqrs of age.*

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape".

8) From the aforesaid provision, it is manifest that, to prove the offence of rape, penetration of penis in vagina is inevitable. The prosecutrix, in her evidence, has stated that, the appellant removed her underwear, threatened her and asked her to take his penis in her hand and forcibly put his penis in her hand. She did not say a single word that appellant penetrated his penis in her vagina or even attempted. Therefore, when the prosecutrix did not tell anything regarding committing intercourse by the appellant, then only on the basis of medical report, that too, only because of some injuries on the private part, it could not be held that, the injuries caused to her vagina were the result of sexual intercourse. Prosecutrix herself deposed that, she received injuries on her private part with bushes and brake liver of the cycle. Of course, the prosecutrix said that immoral act has been done by the appellant, but that does not mean in the aforesaid factual matrix that the appellant has committed any sexual intercourse with her. Here, it is pertinent to note that, giving penis in the hands of a woman itself is an immoral act. Therefore, taking into consideration all these facts, I am of the opinion that, the finding arrived at by the learned trial Court regarding commission of rape on the prosecutrix is mis-conceived and cannot be sustained.

9) Appellant removed the underwear of the prosecutrix and put his penis in her hand by force and neither the said evidence has been rebutted nor there is any material to disbelieve the same,

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therefore, certainly it can be held that, the appellant, did it to outrage modesty of the prosecutrix by using criminal force on her.

10) For offence under Section 366 of the I.P.C., the ingredients required to be proved are that the woman should be kidnapped with intention or knowledge that she will be compelled to marry any person against her will or she may be forced or seduced to illicit intercourse.

11) Appellant took the prosecutrix, a minor girl of 12 years, and kept her with him for the whole night. Neither he attempted to commit intercourse nor he tried to marry. There is nothing on record from which it can be inferred that the intention of appellant was to marry with the girl or to commit illicit intercourse with her. If his intention would have been to commit intercourse, then having sufficient time, appellant would not have missed it. Therefore, in such a scenario, it cannot be held that, the appellant, in order to commit illicit intercourse or to marry the prosecutrix, kidnapped her.

12) From the evidence of the prosecutrix (PW/4) and her mother Kanti Ekka (PW/1) and father Thadiyush Ekka (PW/5), it is clear that, on the invitation of the appellant to take sweats, the prosecutrix and her father had gone with the appellant.

13) The prosecutrix (PW/4) has deposed that, the appellant took her to the house of Sil Kumar, Kandra, Bendar and Noorbhatt searching liquor and when could not get the same, took her to forest and for the whole night appellant kept her there and thereafter he took her to the house of Kanda, where she slept, where the Police came and caught the prosecutrix and appellant together.

14) PW/2, Sil Kumar, to support the evidence of prosecutrix, deposed that, the appellant with the company of prosecutrix, had come to his house and had asked for liquor, which he denied, thereafter, appellant, along with prosecutrix, went from there. Thadiyush Ekka (P.W./5) deposed that, when the appellant and prosecutrix did not come back, he along with Anil Kajur, searched the appellant and prosecutrix, but could not find any of them. Thereafter, he lodged a report in Police Station, and on the next day, in the early morning, Police brought the prosecutrix. Anil Kajur (PW/3) deposed that, he, along with Thadiyush Ekka, searched the appellant and prosecutrix in the night, but they could not be traced out. Kanti Ekka (PW/1) in her statement has also deposed that, a search was made to know the whereabouts of the appellant and prosecutrix, but in the night, they could not be traced out. Pratapchand Toppo (PW/6) and S.R. Dhrit Lahare (P.W.12) have made it clear that, the prosecutrix and appellant were found on the next day in the early morning, the prosecutrix was recovered from the custody of the appellant. Nothing substantial has been brought to disbelieve the aforesaid evidence.

15) From the evidence on record, it is manifest that, the appellant took the prosecutrix, a minor girl of 12 years, and kept her with him for the whole night. It is also clear that, initially the prosecutrix was taken by the appellant with the knowledge of her lawful guardian, but the lawful guardian did not give consent to the appellant for keeping his daughter for the whole night, away from them. Although taking out of the prosecutrix was in his knowledge and they did not return within a reasonable time,

therefore, a search was made. It clearly unveils that, the lawful guardian did not give consent to the appellant for taking his daughter from his lawful custody and; that too; for the whole night. Therefore, it was proved that, the appellant took the prosecutrix, a minor girl of 12 years, out of the keeping of her lawful guardian without his consent.

16) No other points or issues have been raised in arguments advanced by learned counsel for both the parties.

17) From the aforesaid discussions, it is evident that, the learned trial Court by holding the appellant guilty for committing offence under Sections 366 and 376 of the I.P.C., has committed error. Learned trial Court should have held the appellant guilty for committing offence under Sections 363 and 354 of the I.P.C.

18) Accordingly, the appeal is partly allowed and the conviction and sentence passed by the learned trial Court against the appellant for committing offence under Sections 366 and 376 of the I.P.C. is set aside and the appellant is acquitted of the said charges. Conviction under Section 363 of the I.P.C. and sentence awarded for committing the offence punishable under the said section are maintained. The appellant is further held guilty for committing offence under Section 354 of the I.P.C. and is sentenced to undergo R.I. for 1 (one) year and to pay a fine of Rs.1,000/- (Rs.One thousand) and in default of payment of fine to undergo additional R.I. for 3 (three) months with a direction that the substantive sentences of imprisonment awarded under Sections 363 and 354 of the I.P.C. shall run concurrently.

19) Out of the fine recovered, a sum of Rs.2,000/- (Rs.Two thousand) be paid to the prosecutrix in accordance with the

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provisions of Section 357 of the Cr.P.C. Rest of the order/direction passed by the learned trial Court are maintained.

Sd//-
V.K.Shrivastava
Judge

Raju